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IN THE

Supreme Court of the United States

No. 195 OCTOBER TERM—1950

JAMES RUTKIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT WITH BRIEF IN SUPPORT THEREOF

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To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James Rutkin, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit in an opinion (annexed to the record herein) per McLAUGHLIN, *J.*; filed on May 23, 1951, affirming the judgment of conviction of the District Court for the District of New Jersey, convicting petitioner of wilfully attempting to defeat and evade income and victory taxes in violation of Section 145(b) of the Internal Revenue Code. Petitioner was sentenced to 4 years imprisonment and fined $10,000.00. Bail was denied by the District Judge. On application to the United States Court of Appeals for the Third Circuit, petitioner was admitted to bail in the sum of $50,000.00 upon condition that the aforesaid fine of $10,000.00 be paid into the Registry of the United States. The fine was paid and petitioner admitted to bail.

Timely application for rehearing was made to the United States Court of Appeals for the Third Circuit. The application was denied. The mandate of the United States Court of Appeals for the Third Circuit was stayed pending petitioner's application to this Court for a writ of certiorari. Petitioner is now at liberty on bail.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Statement of Case

The indictment contained one count. It charged that petitioner wilfully and knowingly attempted to defeat and evade income and victory taxes for the calendar year 1943 by filing a tax return which failed to include as income the sum of $250,000.00, which was received by petitioner under circumstances hereinafter related. The indictment is founded on Section 145(b) of the Internal Revenue Code (26 U. S. C. 1946 ed.).

Petitioner was convicted by a jury in the United States District Court for the District of New Jersey. He thereupon appealed to the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed the conviction in a divided opinion. Application for rehearing was denied.

Facts

Petitioner and one Joseph Reinfeld had been engaged as partners, with others, in the illegal liquor traffic during the Prohibition Era. Among the other partners were two men named Zwillman and Stacher (12a, 13a, 19a).[1]

[1] References throughout this petition and accompanying brief are to appendix to petitioner's brief in the Court of Appeals, unless otherwise indicated.

In 1933, a wholesale liquor company known as Browne-Vintners was formed and licensed in New York. The illicit combine was liquidated and its treasury became the original invested capital of Browne-Vintners (24a). To conceal the tainted source of this capital as well as the names of the true owners of the capital stock of Browne-Vintners, Reinfeld resorted to several devices. For example, he caused a large part of the capital stock of Browne-Vintners to be held in the names of nominees, with the real stockholders neither appearing of record, nor holding any evidence of their interest in the company (91a, 92a).

In 1940 the capital stock of Browne-Vintners was sold with a large resulting profit to stockholders. The nominees paid the capital gains tax due on these profits. In 1940 a capital gains tax was payable at a flat fixed rate without regard to the ordinary income tax bracket of the recipient of the gain. After payment of the capital gains tax Reinfeld paid the balance remaining to the true stockholders. The Government concedes that the tax due on these profits from the various true stockholders was paid by the nominees (93a). It was because the tax had already been paid on the profits of the Browne Vintners sale that the Government conceded and the trial Jury was charged, that if the petitioner received the $250,000.00 payment in settlement of a bonafide claim of stock ownership in Browne-Vintners, the $250,000.00 would not be taxable to him and the jury would then be obliged to acquit (932a).

In the latter part of 1942 Zwillman and Stacher claimed that Reinfeld had withheld from them part of the true sum due them as their derivative share of the proceeds of the Browne-Vintners stock. Several meetings were held which were attended by Reinfeld, Zwillman, Stacher and the petitioner. Some of these meetings were also attended by accountants and counsel. At the last of these meetings, Reinfeld agreed to pay Zwillman and Stacher $358,000.00 and to

pay petitioner $250,000.00 (45a, 46a, 48a). On May 11, 1943, the money, totalling $608,000.00, was paid in cash at the office of one of the attorneys in the presence of the three payees and three attorneys. A General Release, prepared by Reinfeld's attorney, was signed jointly by Zwillman, Stacher and the petitioner. The Browne-Vintners Company was one of the several releasees mentioned in this instrument (966a,[2] 970a).

In 1948, petitioner instituted a civil suit against Reinfeld in New York seeking accounting and damages in the amount of $22,000,000.00. One of the essential bases of this suit was petitioner's alleged interest in Browne-Vintners. In the course of a pre-trial deposition taken in 1949, Reinfeld said, for the first time, that petitioner had never had any interest whatsoever in Browne-Vintners. Reinfeld explained the payment of the aforesaid $250,000.00 by saying that the petitioner had extorted this money from him by threats to kill Reinfeld and his family unless he was paid a large sum of money (49a, 321a, 322a).

These statements by Reinfeld led to the instant indictment of the petitioner, almost seven years after the payment of the $250,000.00. Zwillman and Stacher were not indicted because the Government relied upon Reinfeld's affidavit that Zwillman and Stacher had received $358,000.00 as a further distributive share of the proceeds of the Browne-Vintners stock and since all the tax on the proceeds of the sale of that stock had been paid, no further tax was due thereon from any person having a bonafide claim to stock ownership in Browne-Vintners.

Petitioner always admitted the receipt of the $250,000.00 but claimed throughout the trial that the $250,000.00 was paid to him as his additional distributive share of the

[2] Exhibit D-8, the general release covering payments made to Zwillman, Stacher, and Rutkin, is set forth in full at page 966a of the Appendix to Petitioner's Brief in the Court of Appeals.

tax-paid proceeds of the sale of the Browne-Vintners stock, just as the $358,000.00 was paid to Zwillman and Stacher (932a). On the other hand, the Government contended throughout the trial that in 1943 petitioner had no claim whatsoever in the proceeds of the sale of the Browne-Vintners stock; that his assertion of such claim was to his knowledge without any basis in fact, and that such demands or claims as he made upon Reinfeld were spurious; and that petitioner extorted the $250,000.00 from Reinfeld by threats to kill Reinfeld or his family if the money was not paid (40a, 41a, 321a, 322a).[3] The case went to the jury under instructions by the trial Court that if they believed the contention of the Government beyond a reasonable doubt, the $250,000.00 was taxable income and they could convict the petitioner; that if the jury believed that the petitioner had received the money in settlement of a bona-fide claim of right to some stock ownership in Browne-Vintners, the $250,000.00 was not taxable and the petitioner should be acquitted (930a, 932a).

The Questions Presented

The following questions arise as a result of the action of the trial Court as affirmed by the United States Court of Appeals:

1. Is extorted money taxable within the meaning of 26 U. S. C. 22(a)?

2. Is extorted money taxable within the meaning of 26 U. S. C. 22(a) because an extortionist asserts a patently spurious claim thereto?

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[3] Brief of Government in the Court of Appeals, at page 13, that:

"The $250,000.00 did not in any way represent a claim which the appellant had with reference to Browne-Vintners. The $250,000.00 was given by Reinfeld to the appellant because of the course of conduct in which the appellant had threatened to kill Reinfeld if he did not give him first $100,000.00, then $200,000.00, then up to $500,000.00 and finally $250,000.00."

3. Is extorted money taxable because the victim of the extortion condones the unlawful misappropriation?

4. Assuming that extorted money is not taxable, is the opinion and action of the Court of Appeals in conflict with former decisions of this Court in the cases of *Commissioner* v. *Wilcox*, 327 U. S. 404, and *U. S.* v. *Lewis*, U. S. March 26, 1951?

5. Where the trial Court charged the jury incorrectly in a specific instruction on a vital issue, and refused to give the jury a lucid statement of the relevant legal criteria on that same vital issue, and the Court of Appeals affirmed the conviction on the basis of new findings of fact, does the petitioner stand convicted according to the procedure and standards appropriate for criminal trial in the federal courts?

Reasons Relied Upon for Allowance of the Writ

The final decision in this cause is not limited to the Third Circuit but is of national effect. The decision of the Court below is apparently in conflict with the decisions of this Court in the *Wilcox* and *Lewis* cases. It is essential that the Internal Revenue Code be administered uniformly throughout the United States. Unless this Court passes upon the effect of condonation and spurious claims as affecting the doctrine and rationale of the *Wilcox* and *Lewis* cases, the Collector of Internal Revenue, the District and Appellate Courts of the United States and the citizens of the United States have no guide upon which to rely in such situations. Failure of this Court to provide such a guide will result in non-uniform administration of the Internal Revenue Code and conflicting decisions by the various District Courts and Circuits. Both these questions are ripe for decision and are squarely presented in the instant case.

The refusal of this Court to grant certiorari in the case of *Humphreys* v. *Commissioner*, 7 Cir., 125 F. 2d 340, 317 U. S. 637, has led to a belief that it is still law, although the *Humphreys* case was impliedly reversed by the decision of this Court in the *Wilcox* and *Lewis* cases. The *Humphreys* case stands for the proposition that ransom money extorted by a kidnapper is taxable. The *Humphreys* case should either be expressly reversed, or affirmed and distinguished in the light of the opinions in the *Wilcox* and *Lewis* cases. The finding by the Court below, that an extortionist may receive the fruits of his extortion with the semblance of a claim of right, is directly in conflict with the decisions of the courts of many states, including New York and New Jersey. This conflict should be resolved for the guidance of both Federal and State courts.

In addition, apparent and prejudicial legal error was committed in the trial of the cause. Under the general supervisory powers which this Court exercises over the District and Appellate Courts of the United States, these errors should be reversed and corrected in this Court.

Apart from such widespread effect on the administration of the Internal Revenue Laws and the administration of criminal justice in the Federal Courts, the decision sought to be reversed, if permitted to stand uncorrected, will result in the petitioner's incarceration upon proof of extortion and not proof of attempted income tax evasion, as charged in the indictment upon which petitioner was tried.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review, a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such

order and direction as this Court shall deem meet under the circumstances of the case, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem just and proper.

July 17, 1951.

(Signed) JAMES RUTKIN,
Petitioner.

(Signed) JACK L. COHEN,
Attorney for Petitioner.

(Signed) EDWARD HALLE,
Of Counsel.

Verification

UNITED STATES OF AMERICA,
STATE OF NEW YORK, } ss
COUNTY OF NEW YORK,

JAMES RUTKIN, of full age, being duly sworn according to law, upon his oath deposes and says:

I am the petitioner named in the foregoing petition; and the matters therein contained are true to the best of my knowledge, information and belief.

(Signed) JAMES RUTKIN

Sworn and subscribed to before
me this 17th day of July, 1951.

JAMES J. AHRENS
Notary Public for the State of New York
Qualified in Nassau County
No. 30-5031225
Certs. filed with Co. Clerk's New York
and with City Register New York
Commission Expires March 30, 1952

ARGUMENT

POINT I

Is extorted money taxable within the meaning of 26 U. S. C. 22(a)?

The chief issue in the trial of this cause was as to the taxability under 26 U. S. C. 22(a) of the payment of $250,000.00 admittedly made to petitioner by Reinfeld (932a). The petitioner contended that the money came to him in payment of his bonafide claim to a share in the profits on the sale of the Browne-Vintners stock. In other words, that he received the money with a bonafide claim of right, or the semblance thereof (930a). The Government on the other hand contended that petitioner received the money solely because of threats which he had made against Reinfeld; that no bonafide claim or semblance thereof existed, and that the petitioner secured the money by extortion (930a).

The Government conceded that if petitioner received the money with a bonafide claim of right, or the semblance thereof, he would not be obliged to report the same because the tax thereon had already been paid.[4] The Government's contention in brief is that defendant secured this money by extortion. Examination of the case law on extortion indicates that it is the securing of money or other thing of value by threats to kill or do bodily injury without a bonafide claim to the money or thing of value demanded. *Loftus* v. *State*, 19 Atl. Rep. 103; *People* v. *Griffin*, 2 Barb. 427.

The money was taxable under the facts of this case, only if it was secured by extortion. The trial Court so in-

[4] Brief of Government filed in Court of Appeals, page 28:

> "At the outset, it is conceded that if the appellant was an owner of Browne-Vintners and if the $250,000.00 represented his share of the proceeds of the sale of that company, he was entitled to an acquittal as the trial Court charged."

structed the jury (932a). The Government agrees, that by its verdict, the jury rejected petitioner's contention and concluded that the $250,900.00 derived solely from extortion, as defined above, and that the petitioner had no bonafide claim, or semblance thereof, in the money derived from the sale of Browne-Vintners.[5] Therefore, unless money secured by extortion is taxable within the meaning of 22(a), this $250,000.00 was not taxable income to petitioner and the conviction can not be affirmed. A determination on this point was essential to a disposition of the appeal below but the lower Court failed to determine the same.

The cases hold that extortion is the securing of money by threats to do bodily harm without any bonafide claim or right to the money so secured. *People* v. *Griffin*, 2 Barb. 427; *Loftus* v. *State*, *supra*; *Cutter* v. *State*, 36 N. J. L. 125; the cases further hold that the use of threats to enforce collection of money does not constitute extortion, where the alleged extortionist has a bonafide claim of right, or the semblance thereof, to the money involved. *McMillen* v. *State*, 60 Ind. 216; *State* v. *Hammond*, 80 Ind. 81, 41 Am. Rep. 791; *Mann* v. *State*, 47 Ohio St. 556, 11 L. R. A. 656. Measured in the language of the decision of this Court in the case of *Commissioner* v. *Wilcox*, 327 U. S. 404 and *U. S.* v. *Lewis*, U. S. March 26, 1951, it is clear from the decisions of these various states that an extortionist receives the fruits of his extortion without the existence of a bonafide claim of right, or a semblance thereof, and that he receives the fruits of his extortion with a definite unconditional obligation to return the same. *Miller* v. *Eisele*, 111 N. J. L. 268. It further appears that a person from whom money was extorted is entitled under the statutes of New Jersey to replevy the money as soon as it

[5] Brief of Government filed in Court of Appeals, page 28:

"By its verdict the jury necessarily rejected the appellant's position and concluded that the $250,000.00 payment derived not from the appellant's allegedly undisclosed stock ownership in Browne-Vintners but from the threats made upon Reinfeld's life."

comes into the hands of the extortioner. New Jersey Statutes Annotated 2:73-1 and 2. An extortioner, like a thief or embezzler, is never vested with either a void or voidable title.

From all of the foregoing, when viewed in the light of the decisions in the *Wilcox* and *Lewis* cases, the moneys received by an extortionist are not taxable income within the meaning of Section 22(a). Despite the decision in the *Wilcox* and *Lewis* cases, the lower Court in this case and the Court in the case of *Estate of Joseph Nitto*, 13 T. C. 858 have held that extorted money was taxable within the meaning of 22(a). Both these decisions were rested in large part on the case of *Humphreys* v. *Commissioner*, 7 Cir., 125 F. 2d 340. This Court denied certiorari in the *Humphreys* case 317 U. S. 637. Armed with this denial, the Government in its brief filed in the *Wilcox* case argued strenuously that both extorted and embezzled funds are taxable. By its decision in the *Wilcox* case; this Court has impliedly reversed so much of the *Humphreys* case as held extorted money taxable within 22(a). This petition for certiorari should be granted and the *Humphreys* case expressly overruled, so that other courts in the future will decide such situations in a manner not in conflict with the *Wilcox* and *Lewis* cases.

POINT II

Is extorted money taxable under 22(a) because the extortionist asserts a patently spurious claim thereto?

As shown above, the Government throughout the trial relied for conviction upon the contention that the payment of the $250,000.00 was extorted by the petitioner. In its brief in the Court below, the Government for the first time argued that the payment to petitioner was taxable because

he had received the same under a claim of right;[6] but even at this point the Government does not concede that this claim of right which was asserted by petitioner was a bona-fide claim. In fact, the Government still says that the claim was spurious. (See footnote 5, *supra*). The Government of course does not admit that the claim was bonafide, because if it should so admit, having already conceded that the tax was paid on the Browne-Vintners' profit, it would have to further concede that the money was not taxable to petitioner. The Government argues that, because petitioner asserted a spurious claim of right, this money is taxable to petitioner and the case distinguishable from the rule laid down in the *Wilcox* and *Lewis* cases.

The lower Court approved such a legal conclusion.

This Court is now called upon to approve the legal conclusion that money received through extortion is taxable, if the unlawful demands of the extortioner are couched in terms of a spurious general claim asserted in bad faith. We agree with the language of the dissent in the Court below "that disapproval is required by the ruling of the Supreme Court in *Commissioner of Internal Revenue* v. *Wilcox*, 1946, 327 U. S. 404." Both the Government and the lower Court seemed to have missed the clear indication contained in the *Wilcox* and *Lewis* cases to the effect that income is not taxable unless there *exists* a *bonafide* claim of right, whether mistaken or not. There is nothing in the language of either of these cases which would permit the substitution of the word "spurious" for the word "bona-fide" or the substitution of the word "asserted" for the word "existence" in the phrase of the *Wilcox* decision which said taxability is conditioned upon "existence of a

[6] Brief of Government in the Court of Appeals, page 29:

"It will be recalled that both Reinfeld and the appellant testified that the appellant claimed the $250,000.00 as of right. * * * The taking under the alleged claim alone distinguishes this case from *Commissioner* v. *Wilcox* * * *."

bonafide legal or equitable claim." In this connection great weight should be given to the emphasis placed by this Court upon the phrase "bonafide claim" as repeated in the *Lewis* case. We are not here concerned with a bonafide claim of right which later was learned to be a mistaken one. In this case petitioner's claim was either bonafide or spurious when originally asserted and has not changed character in the interval between then and now. Since the jury came to the conclusion that the claim was spurious, it is not the type of claim which would render the money taxable under Section 22(a) in the light of the *Lewis* and *Wilcox* cases.

POINT III

Is extorted money taxable because the victim of the extortion condones the unlawful misappropriation?

In its brief in the Court below, the Government for the first time argued that the payment of $250,000.00 was taxable to petitioner, because Reinfeld had condoned the illegal means by which petitioner had secured payment thereof. Condonation had never been an issue in the trial Court. The point was never treated there by motion, requested charge, instructions or argument to the jury, and the point was likewise neither briefed nor argued in the Court below. Nevertheless the Court below rested its affirmance of the conviction strongly upon the finding of condonation, and to justify its action, rested upon the following language of this Court in the *Wilcox* case:

> "or had his employer condoned or have forgiven any part of the unlawful appropriation the taxpayer might have been subject to tax liability to that extent. But neither situation is present in this proceeding and we need not explore such possibilities." *Commissioner* v. *Wilcox*, 404, 409.

The quoted language of this Court was by its own declaration less than *dicta* and the point was expressly passed. By its action the Court below has squarely placed this issue before this Court.

The possibilities which may arise from condonation, for the purposes of Section 22(a), are varied. The counsel to the Treasury of the United States has so indicated and he has likewise indicated that the questions arising from condonation are far from settled. GCM 24945, CB 1946-2, page 27. In the instant case, for example, if the $250,000.00 was not taxable income because it was extorted, does condonation of the unlawful misappropriation translate the payment into a gift. If so, is it taxable to the donor or the donee? When a creditor erases a bad debt, the money loaned does not usually become taxable income to the donor. The further consideration arises as to when condonation became effective in this case. Was it when the release was taken or when the Statute of Limitations expired; or was it at some intervening time when Reinfeld may have decided to permanently forego the remedies which he might have pursued to recover the money.

Petitioner contends that under the facts of this case condonation would not translate the $250,000.00 into taxable income and respectfully urges that certiorari be granted so that he may have opportunity to brief and argue this point and so that the Commissioner of Internal Revenue and the Federal and State Courts may have the benefit and guidance on this point of a decision of this Court.

POINT IV

Assuming that extorted money is not taxable within 22(a) is the opinion and action of the Court below in conflict with former decisions of this Court in the cases of *Commissioner* v. *Wilcox*, 327 U. S. 404 and *U. S.* v. *Lewis*, U. S. March 26, 1951.

At the conclusion of the presentation of the Government's case in the trial Court, the Government's case was that petitioner had threatened Remfeld with violence and used a gun in the threat and threatened to kill him and his family and that the $250,000.00 was paid over not for any other purpose except to assuage the murderous instincts or threats of the defendant (321a, 322a).

The petitioner moved at that time for a judgment of acquittal upon the ground that money secured under those conditions was not taxable income within the meaning of Section 22(a); (315a). At the conclusion of the entire case the motion was renewed and the same ground was urged (915a, 916a). The trial Court denied the motions. The action of the Court of Appeals in failing to reverse the conviction is error in this respect, and is in conflict with the decisions of this Court in the *Lewis* and *Wilcox* cases. As shown above, it was Government's theory that the money could be taxable to the petitioner only if it was extorted. As also shown above, the trial Court so charged the jury. Assuming that extorted money is not taxable under the *Wilcox* and *Lewis* cases, the action of the Court of Appeals in affirming the conviction was error. The only hypothesis upon which the jury was instructed to find the defendant guilty was one which failed to state an offense under Federal law. Therefore, the defendant should have been acquitted and the Court of Appeals should have so ruled. Failure to do so, was tantamount to placing the defendant on trial for extortion.

Extortion is not an offense under Federal law and was not the crime for which the defendant was indicted. Failure to grant certiorari on this point and to reverse the conviction would subject petitioner to the deprivation of a fundamental constitutional right to wit: the right of a defendant to be tried for the crime for which he is charged in a particular indictment; and in that petitioner was convicted of an offense which was no part of the crime for which he was indicted.

POINT V

Where the trial Court charged the jury incorrectly in a specific instruction on a vital issue, and refused to give the jury a lucid statement of the relevant legal criteria on that same vital issue, and the Court of Appeals affirmed the conviction on the basis of new findings of fact, does the petitioner stand convicted according to the procedure and standards appropriate for criminal trial in the federal courts?

The defendant's counsel, in making requests to charge to the trial Court, included the following request No. 29, which the Court refused to charge:

> "It is admitted that the capital gains tax on the sale of all the Browne-Vintners stock was paid, and, therefore, if the money which Rutkin received came to him as a result of his interest in Browne-Vintners stock, it was not taxable, he was under no obligation to report it in his income tax return for 1943, and he must be acquitted. Even if you believe Rutkin made threats to Reinfeld and that these threats produced the money, if the money was in payment of Rutkin's interest in the Browne-Vintners stock, he should be acquitted." (949a)

It is submitted, for the reasons following, that the refusal of the Court to make the charge in the language as

requested, or the substance of the charge in any language, was prejudicial error which this Court should review in the exercise of its supervisory jurisdiction over the administration of justice in Federal Courts.

Rutkin in his defense claimed the $250,000.00 payment as of right from Reinfeld, as the holder of his derivative share in the tax paid profits and return of capital in the Browne-Vintners venture. It is conceded that all income taxes due from the profits of the Browne-Vintners sale had been declared and paid to the Government prior to 1943, by the nominees and that none of the beneficial holders of the stock were, as a consequence, required to pay any further income tax on the mentioned profits.

The Government, while making this concession, nevertheless prosecuted the petitioner on the theory that the payment he received from Reinfeld was not a part of the stock transaction but that the funds were paid purely as a result of threats petitioner made to Reinfeld without any semblance of a claim of right to the monies. In charging the Jury, the trial Court gave instructions which presented a sharp dichotomy: leaving them the choice of acquittal, if they found that petitioner was entitled to the fund as of right; or of guilt, if they found that the payment was made as a result of extortion. The instructions precluded the middle ground, which was a justifiable hypothesis on all the evidence presented, as set forth in the refused request No. 29, that petitioner was rightfully entitled to the money but enforced payment to him by the means of threats.

The pertinent parts of the Courts charge follow:

> "If that money was extorted and was paid as a result of threats, then it was taxable income and Rutkin was under the duty of reporting that tax." (930a)

"There is no contention here that the defendant didn't know he got the $250,000; the whole point is whether he got it by extortion or whether he got it properly. If he got it properly the tax was already paid." (932a)

These excerpts contain the only reference in the Court's charge to guide the jury concerning the keystone upon which was balanced the guilt or innocence of the petitioner. First: the Court states that if the money was extorted and paid as a result of threats, the petitioner is guilty. Second: the Court states the whole point is whether petitioner got it by extortion, or whether he got it properly. The entire instruction leads the Jury to only one result if they find as fact that the threats were made. They simply follow the line of reasoning as instructed: (1) threats mean extortion, (2) extortion results in taxable income not reported, (3) petitioner must be found guilty.

The instructions provided by the Court do not permit the Jury to find that petitioner received the money "properly" if they at the same time find that threats were employed. Thus, it resulted in substantial prejudicial error when request No. 29, which would have clarified the charge, was refused.

The trial Court's instruction to the jury that extorted money is taxable was a specific instruction on a vital issue. In reviewing the conviction, the question is not whether guilt may be spelled out of the record on the basis of new findings of fact by the Court of Appeals, but whether guilt has been found by the jury according to the standards appropriate for criminal trials in federal courts and whether the finding of guilt by the jury is based upon instructions which clearly set forth the state of the law on the vital issues concerned. *Bollenback* v. *U. S.*, 326 U. S. 607.

In the instant case it is impossible to disregard the misdirection by assuming that the jury paid no attention to it, because the jury was also instructed that it could convict only if it found that the $250,000 was extorted. In charging as he did on this point and in refusing defendant's requested charge No. 29, the trial Court failed in his responsibility to give the jury a lucid statement of relevant legal criteria. Only upon such a statement can a jury adequately discharge its responsibility for drawing appropriate conclusions from the testimony. The Court of Appeals sustained the conviction upon its own finding that the defendant received the $250,000 with a claim of right, as opposed to the jury's finding it had been extorted. We now have conflicting theories in the trial Court and in the Court of Appeals regarding a charge designed to guide the jury in determining guilt. Yet the conviction was affirmed upon the assumption that the jury was properly guided. Under these circumstances, the assumption must fall.

CONCLUSION

For the reasons assigned and the authorities in support thereof, this Court should grant the writ of certiorari to petitioner, and, upon appeal which shall be heard thereon, reverse petitioner's conviction.

Respectfully submitted,

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